Abdillah bin Labo Khan v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO D–05–33 OF 1996

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

1 APRIL 2002

Criminal Law *— Dangerous drugs — Trafficking — Specific finding that accused was in possession of dangerous drugs made at the end of judgment — Whether such finding to be made at the end of prosecution's case instead — Dangerous Drugs Act 1952 s 39B*

Criminal Procedure *— Appeal — Appellate court, power of — Proviso to s 60(1) of the Courts of Judicature Act 1964 — When such proviso may be invoked — Courts of Judicature Act 1964 s 60(1) proviso*

Criminal Procedure *— Judgment — Effect of — Whether judgments retrospective in effect*

The appellant appealed against his conviction and mandatory death sentence under s 39B of the Dangerous Drugs Act 1952 ('the Act'). Counsel for the appellant submitted that the trial judge had wrongly found the appellant to be in possession of dangerous drugs by merely acting on the presumptions under s 37(d) and (da) of the Act. The trial judge first found the appellant had custody and control of the dangerous drugs. He then presumed the appellant to be in possession of the drugs under s 37(d) of the Act. The trial judge having found the appellant to be in possession of the drugs by such presumption, proceeded to invoke the presumption under s 37(da) of the Act and held the appellant to be a presumed trafficker since he was 'found in possession' of drugs more than the statutory minimum weight prescribed under s 37(da). Counsel further argued that there was a serious misdirection in that there was no specific finding of fact based on evidence by the trial judge that the appellant was indeed 'found in possession' of the drugs at the close of the prosecution's case. In opposing the appeal, the deputy public prosecutor submitted that: (i) the Court of Appeal ought to apply the proviso to s 60(1) of the Courts of Judicature Act 1964; (ii) the trial judge did make a specific finding to the effect that the appellant was found in possession of the drugs in question; and (iii) the instant case was decided before the Federal Court decision of *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 which, inter alia, held that there must be an express affirmative finding of possession based on evidence before the presumption of trafficking may be invoked.

Held, setting aside the conviction and sentence under s 39B of the Act and substituting therefor a conviction under s 12(2) read with s 39A(2) of the Act and a sentence of 18 years' imprisonment and ten strokes of the rotan:

(1) The proviso to s 60(1) is to be applied only to an exceptional case. On the facts, the instant case had nothing exceptional about it (see p 303F–G); *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 followed.

(2) The trial judge's specific finding to the effect that the appellant was found in possession of the drugs in question was made in the concluding passage of his judgment, after he had considered and dealt with the appellant's evidence in defence to the charge. That was wholly inadequate. The direction should have been made at the close of the prosecution's case (see p 303G–I).

(3) It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect. The Federal Court decision in *Muhammad bin Hassan v PP* [1998] 2 MLJ 273 falls under the general doctrine of retrospectivity and it therefore applied to the instant case. The Court of Appeal was accordingly bound to follow the decision (see pp 304A, 305A–B).

[Bahasa Malaysia summary

Perayu merayu terhadap pensabitan beliau dan hukuman mati mandatori di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'). Peguam bagi pihak perayu telah berhujah bahawa hakim perbicaraan telah secara salah memutuskan perayu mempunyai milikan dadah berbahaya dengan hanya bertindak atas tanggapan di bawah s 37(d) dan (da) Akta tersebut. Hakim perbicaraan telah pertamanya memutuskan perayu mempunyai dalam jagaan dan kawalannya dadah berbahaya. Beliau kemudiannya menjangkakan perayu mempunyai milikan dadah tersebut di bawah s 37(d) Akta tersebut. Hakim perbicaraan setelah memutuskan perayu mempunyai dalam milikannya dadah tersebut melalui tanggapan yang sedemikian, terus menggunakan tanggapan itu di bawah s 37(da) Akta tersebut dan memutuskan bahawa perayu sebagai pengedar yang dijangkakan oleh kerana beliau 'found in possession' dadah yang lebih daripada berat minima statutori yang ditetapkan di bawah s 37(da). Peguam selanjutnya berhujah bahawa terdapat salah arahan yang serius iaitu bahawa tidak terdapat keputusan fakta yang khusus berdasarkan keterangan oleh hakim perbicaraan bahawa perayu adalah sesungguhnya 'found in possession' akan dadah tersebut pada penutupan kes pendakwaan. Dalam menolak rayuan tersebut, Timbalan Pendakwa Raya berhujah bahawa: (i) Mahkamah Rayuan haruslah memakai proviso tersebut kepada s 60(1) Akta Mahkamah Kehakiman 1964; (ii) hakim perbicaraan telah sesungguhnya membuat keputusan khusus yang bererti bahawa perayu telah didapati mempunyai milikan dadah yang dipersoalkan itu; dan (iii) kes semasa ini telah diputuskan sebelum keputusan Mahkamah Persekutuan bagi *Muhammad bin Hassan v PP* [1998] 2 MLJ 273 yang mana antara lainnya memutuskan bahawa seharusnya terdapat

keputusan pengiaan yang nyata mengenai pemilikan berdasarkan keterangan sebelum tanggapan mengedar boleh digunakan.

Diputuskan, mengenepikan pensabitan dan hukuman di bawah s 39B Akta tersebut dan menggantikan baginya satu pensabitan di bawah s 12(2) yang dibaca bersama s 39A(2) Akta tersebut dan satu hukuman pemenjaraan selama 18 tahun serta 10 sebatan rotan:

(1) Proviso kepada s 60(1) hendaklah dipakai hanya kepada kes-kes terkecuali. Berdasarkan fakta-fakta, kes semasa tiada apa-apa mengenainya yang terkecuali (lihat ms 303F–G; *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 diikut.

(2) Keputusan spesifik hakim perbicaraan yang bererti bahawa perayu telah didapati mempunyai milikan dadah yang dipersoalkan telah dibuat dalam perenggan kesimpulan penghakiman beliau, selepas beliau telah mempertimbangkan dan menguruskan keterangan perayu terhadap pertuduhan tersebut. Itu adalah sesungguhnya tidak memadai. Arahan tersebut sepatutnya telah dibuat pada penutupan kes pendakwaan (lihat ms 303G–I.

(3) Ianya adalah prinsip penting jurisprudens adjudikatif bahawa kesemua penghakiman sesebuah mahkamah adalah bersifat kebelakangan. Keputusan Mahkamah Persekutuan di dalam *Muhammad bin Hassan v PP* [1998] 2 MLJ 273 terlingkung di bawah doktrin umum berkebelakangan yang ianya oleh itu terpakai pada kes semasa. Mahkamah Rayuan adalah sehubungan itu terikat untuk mengikuti keputusan tersebut (lihat ms 304A, 305A–B).]

Notes

For cases on appellate court, power of, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 215–218.

For cases on Dangerous Drugs Act 1952 s 39B, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 126–149.

For cases on judgment see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1859–1914.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1966] 1 MLJ 209 (folld)

Choice Investments Ltd v Jeromnimon and another appeal [1981] 2 WLR 80 (refd)

Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)

Jones v Secretary of State for Social Services and another appeal [1972] AC 944 (refd)

Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)

Linkletter v Walker (1965) 381 US 618 (refd)

Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)

A *PP v Dato' Yap Peng* [1987] 2 MLJ 311 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)

Legislation referred to

B Courts of Judicature Act 1964 s 60(1) proviso
Dangerous Drugs Act 1952 s 37(d), (da)

Appeal from: Criminal Trial No 45–6–1995 (High Court, Kota Bharu)

Karpal Singh (*Gobind Singh Deo* with him) (*Karpal Singh & Co*) for the C appellant.

Nurulhuda Nur'aini bte Mohamad Nor (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal raises a short point. A point already traversed by high authority. It concerns D the joint operation of s 37(d) and (da) of the Dangerous Drugs Act 1952 ('the Act').

The facts are simple enough. As long ago as 1 May 1994, at about 12.20pm, the appellant was stopped at a roadblock at Nibong, Kampung Bendang Pak Yong, Kelantan. The appellant was riding a motorcycle. E PW4, who was at the roadblock, having stopped the appellant, escorted him to a wakaf, a place of rest for travellers. The appellant was searched. He was wearing a jacket zipped all the way up to the collar. He was asked to remove it. A body search by PW4 resulted in the recovery of a packet containing a white substance which on subsequent chemical examination was found to be heroin weighing 81.58g. The appellant was charged for an offence under F s 39B of the Act. He was convicted on that charge and the mandatory death sentence was passed on him. He now appeals.

The only ground advanced on his behalf by his counsel, Mr Karpal Singh, is that the learned judge wrongly found the appellant to be in possession of the drugs, by merely acting on the presumptions under G s 37(d) and (da) of the Act. In other words, the learned trial judge first found the appellant to have had custody and control of the drug in question. He accordingly, in terms of s 37(d) of the Act, presumed that the appellant was in possession. Thereafter, the learned trial judge moved to s 37(da) of the Act. Having found the appellant to be in possession, through the process of reasoning we have just described, the learned judge held the appellant to H be a presumed trafficker since he was 'found in possession' of more than the statutory minimum weight prescribed in that subsection. Counsel says this is a very significant point. It had persuaded the judge to find against the appellant as he mentions this twice in his judgment. Counsel complains that there was no specific finding by the learned judge at the close of the prosecution's case in the terms required by s 37(da) of the Act. Put in a I different fashion, the learned judge first must have held as a fact based on the evidence before him, that the appellant indeed was 'found in possession' of the drug. A careful reading of the judgment, counsel argues, shows that

there was indeed no such finding made after the learned judge considered the evidence as it stood at the close of prosecution's case. This, counsel says, is a serious misdirection warranting the setting aside of the conviction under s 39B and the substitution of a conviction for an offence under s 12(2) read with s 39A(2) of the Act.

In support of his argument, counsel has referred us to the judgment of a strongly constituted Federal Court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. That case has been cited to us often enough. Yet, its importance merits the reproduction of the relevant passage in the judgment of the learned Chong Siew Fai CJ (Sabah and Sarawak). This is how he put it at pp 287–289:

> In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.
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> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed ... trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.
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> In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

In responding to the appeal, Cik Nurulhuda, Deputy Public Prosecutor, while not contending that there has not been any misdirection, submits that we ought to apply the proviso to s 60(1) of the Courts of Judicature Act 1964. In support of her argument, she relies on the judgment of the full

bench of the Federal Court in *Tunde Apatira & Ors v PP* [2001] 1 MLJ 259 at p 266:

> So it comes to this. As a general rule, this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v PP* [1966] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception.

Cik Nurulhuda who has argued against this appeal with much ability has skillfully sought to convince us that the evidence in the present case would have produced the same result even in the absence of the misdirection as in *Tunde Apatira*. However, we are unable to agree with her argument. The Federal Court in *Tunde Apatira* made it clear that the proviso is to be applied only to an 'exceptional case'. Those are the words used. In *Tunde Apatira*, the circumstances were exceptional. We need not rehearse the facts of that case here. Suffice to say that the courts at all three levels in that case found the evidence overwhelming. Further, *Tunde Apatira* was a case where there had been concurrent finding of facts. The present case, in our view, is covered by the following passage in the judgment of Edgar Joseph Jr FCJ in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, at p 220 in a passage drawn to the attention of the learned deputy by our learned brother, Alauddin JCA in the course of the argument at p 220:

> Having said that, we would add that there may well be cases where because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial court should, specifically, so find.

It is trite law that the burden of showing that the facts of a particular case are 'overwhelming' (in the sense used in *Tunde Apatira* and the authorities therein cited) lies squarely on the shoulders of the prosecution. The learned deputy attempted, by reference to the evidence, to argue that this is an exceptional case. But we find nothing exceptional about it. The facts have been set out earlier. This case has no such features in the evidence as we came across in such cases as *Khoo Hi Chiang* [1994] 1 MLJ 265 for example.

There are two other submissions made by the learned deputy that require to be addressed. The first is her argument that the trial judge did in fact make a specific finding to the effect that the appellant was found in possession of the drugs in question. However, it is to be observed that this finding was made in the concluding passage of his judgment, after he had considered and dealt with the appellant's evidence in defence to the charge. That, in our view is, with respect, wholly inadequate. The direction, if any, should have been administered by the trial judge unto himself when he was considering the evidence led by the prosecution. In other words, it should have been done at the close of the prosecution's case. So, this submission of the learned deputy comes to nothing.

The second point raised by the learned deputy is that the present case was decided before *Muhammed bin Hassan*. With respect, that again is no answer. It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect. In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v Walker* (1965) 381 US 618 (at p 628). That principle has been adopted into our jurisprudence in *PP v Dato' Yap Peng* [1987] 2 MLJ 311, where, at pp 320–321, Abdoolcader SCJ said:

> The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v Walker* (1965) 381 US 618 (at p 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *LC Golak Nath v State of Punjab & Anor* AIR 1967 SC 1643 (at pp 1666–1669). The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it — to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.
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> In England, this doctrine has been recognized by the House of Lords by necessary implication in the *Practice Statement (Judicial Precedent)* Vol 123 DLR (Third) 554 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, in *Jones v Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at p 1015) and Lord Simon of Glaisdale (at p 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v Jeromnimon* [1981] 2 WLR 80, Lord Denning MR in his judgment in the English Court of Appeal (at p 84) accepted the subsistence and application of the doctrine. In *Defrenne v Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

Although *Linkletter v Walker* and *PP v Dato' Yap Peng* concerned the constitutionality of statutes, the same principle applies to decisions in other areas of the law. This appears sufficiently from the cases of *Jones v Secretary of State for Social Services and another appeal* [1972] AC 944 and *Choice Investments Ltd v Jeromnimon and another appeal* [1981] 2 WLR 80, both of which are referred to in the passage above quoted.

A The Federal Court could, therefore, if it had so wished, have declared its decision in *Muhammed bin Hassan* to be of prospective effect only. Had it done so, then cases decided under the former misconception about the way in which ss 37(d) and (da) of the Act were to be applied would not have been available for correction on appeal. But that is not what happened. The decision in *Muhammed bin Hassan* consequently falls under the general B doctrine of retrospectivity and it therefore applies to the present case. We therefore are bound to apply it.

For the reasons we have given, we allow this appeal and set aside the conviction and sentence under s 39B of the Act and substitute in its place a conviction under s 12(2) read with s 39A(2) of the Act.

C Counsel for the appellant has cited to us the case of *Chow Kok Keong v PP* [1998] 2 MLJ 337 where an accused found in possession of about 86g of heroin was sentenced to 18 years' imprisonment and to ten strokes of the rotan. But that was a case where there was no previous conviction. In this case, the appellant has two previous convictions, both of which concern drugs. The learned deputy urged us to impose a deterrent sentence.

D Weighing all the considerations, including the gravity of the offence and public interest, we impose 18 years' imprisonment and ten strokes of the rotan. Before we conclude, we would like to express our appreciation to both counsel and the learned deputy for their assistance rendered to us during argument.

E *Conviction and sentence under s 39B of the Act set aside and substituted with a conviction under s 12(2) read with s 39A(2) of the Act and a sentence of 18 years' imprisonment and ten strokes of the rotan.*

Reported by Andrew Christopher Simon

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